Abu Samah bin Omar v Zainal bin Montel

HIGH COURT (MELAKA) — CIVIL APPEAL NO 11–30 OF 2001
LOW HOP BING J
4 NOVEMBER 2003

Tort — Defamation — Qualified privilege — Statements made in police report — Whether qualified privilege — Whether in compliance with drafting requirements in pleading libel

This is an appeal by the appellant/defendant ('the defendant') against the decision of the learned magistrate who found the defendant liable in libel against the plaintiff and awarded the plaintiff a sum of RM8,000 as damages, and a further sum of RM1,000 as exemplary damages. The basis of the libel claim was on a police report made by the plaintiff against the defendant who was appointed to carry out demolition and construction works in the plaintiff's house, after money and jewellery were found to be missing. The defendant submitted that the plaintiff's statement of claim has failed to comply with the drafting requirements in pleading libel to establish the tort of libel against the defendant, and that the learned magistrate has erred in law in holding that the defence of qualified privilege did not apply.

Held, allowing the appeal:

(1) The tort of defamation, ie libel and slander requires a special treatment in so far as the drafting of the pleading is concerned, in particular the plaintiff's statement of claim. The draftsman of the plaintiff's statement of claim has pleaded 'bilik tidak diselang' (the room was not intervened (or interposed)) when the police report stated 'bilik tidak diselongkar' (the room was not rummaged). In any event, it has fallen short of the requirement of drafting the statement of claim for the tort of libel as it was not what the defendant has stated in his police report (see paras 7, 9 and 10).

(2) In relation to the police report lodged by the defendant, neither the plaintiff's fundamentally flawed statement of claim nor his oral evidence has ever identified which particular words therein are defamatory of him or has contained any defamatory imputation against him, since the actual words in the police report have never been specifically pleaded by the plaintiff in his statement of claim. The learned magistrate did not appear to have considered this fundamental flaw in the plaintiffs statement of claim (see para 15).

(3) Since the plaintiff's statement of claim did not plead the actual words used in the police report, it is impossible for the learned magistrate to come to a specific finding as to which defamatory words or defamatory imputations were published of and concerning the plaintiff (see para 17).

(4) The plaintiff's statement of claim merely stated that the defendant has made a police report but did not plead to whom the alleged libel has been published. No police personnel has been called by the plaintiff to prove this essential issue of publication to a third party (see para 19).

(5) The learned magistrate has erred in failing to apply the defence of qualified privilege as the plaintiff was unable to adduce any evidence of malice on the part of the defendant and indeed the learned magistrate has come to a specific finding that there was no malice on the part of the defendant (see para 23).

[**Bahasa Malaysia summary**

Ini adalah rayuan daripada perayu/defendan ('defendan') terhadap keputusan majistret yang arif yang telah mendapati defendan bertanggungjawab di dalam libel terhadap plaintif dan mengawardkan jumlah RM8,000 sebagai ganti rugi dan jumlah selanjut RM1,000 sebagai ganti rugi teladan. Dasar tuntutan libel adalah laporan polis yang dibuat oleh plaintif terhadap defendan yang telah dilantik untuk melaksanakan kerja-kerja perobohan dan pembinaan di dalam rumah plaintif, selepas wang dan barangan kemas telah didapati hilang. Defendan telah menghujahkan bahawa penyataan tuntutan plaintif telah gagal mematuhi peruntukan-peruntukan draf di dalam merayu untuk libel untuk mendirikan tort libel terhadap defendan dan bahawa majistret yang arif telah khilaf dari segi undang-undang di dalam memutuskan bahawa pembelaan perlindungan bersyarat tidak terpakai.

Diputuskan, membenarkan rayuan:

(1) Tort fitnah iaitu libel dan slander memerlukan perlakuan yang khas dimana pendrafan pliding berkenaan, khususnya penyataan tuntutan plaintif. Pendraf penyataan tuntutan plaintif telah menyatakan bahawa bilik tidak diselang apabila laporan polis menyatakan bilik tidak diselongkar. Walau bagaimanapun, ia tidak mematuhi peruntukan untuk mendraf penyataan tuntutan itu untuk tort libel kerana ia bukan apa yang defendan menyatakan di dalam laporan polis (lihat perenggan-perenggan 7, 9 dan 10).

(2) Berkenaan laporan polis yang dibuat oleh defendan, penyataan tuntutan plaintif yang cacat pada dasarnya ataupun keterangan lisannya tidak mengenalpasti perkataan-perkataan yang khusus yang memfitnahkannya atau mempunyai kaitan fitnah terhadapnya, memandangkan bahawa perktaan-perkataan sebenarnya tidak diplidkan oleh plaintif di dalam penyataan tuntutannya. Majistret yang arif seakan-akan tidak mempertimbangkan kecacatan dasar di dalam penyataan tuntutan plaintif (lihat perenggan 15).

(3) Memandangkan bahawa penyataan tuntutan plaintif tidak memplidkan perkataan-perkataan sebenarnya yang digunakan di dalam laporan polis, ia tidak mungkin untuk majistret memutuskan secara khusus perkataan-perkataan fitnah atau kaitan-kaitan fitnah yang mana yang diterbitkan atau berkait plaintif (lihat perenggan 17).

(4) Penyataan tuntutan plaintif hanya menyatakan bahawa defendan telah membuat laporan polis tetapi tidak memplid kepada siapa libel yang dikatakan itu diterbitkan. Tiada polis yang dipanggil oleh plaintif untuk membuktikan isu penting terbitan ke parti ketiga (lihat perenggan 19).

(5) Majistret yang arif telah khilaf di dalam gagal memakai pembelaan perlindungan bersyarat memandangkan plaintif tidak menunjukkan apa-apa keterangan niat jahat pada defendan dan majistret yang arif telah memutuskan secara khusus bahawa tiada niat jahat pada defendan (lihat perenggan 23).]

Notes

For cases on qualified privilege, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 473-479.
For qualified privilege, see 2 *Halsbury's Laws of Malaysia*, paras [30.108]–[30.127].

Cases referred to

Abdul Rahman Talib v Seenivasagam & Anor [1965] 1 MLJ 142 (refd)
Ayob bin Saud v TS Sambanthamurthi [1989] 1 MLJ 315 (refd)
Hassan & Anor v Wan Ishak & Ors [1961] MLJ 45 (refd)
Hebditch v MacIlwaine [1894] 2 QB 54 (refd)
Hoe Thean Sun & Anor v Lim Tee Keng [1999] 3 MLJ 138 (refd)
Hough v London Express Newspaper Ltd [1940] 2 KB 507 (refd)
Institute of Commercial Management, United Kingdom v New Straits Times Press (Malaysia) Bhd [1993] 1 MLJ 408 (refd)
Karpal Singh a/l Ram Singh v DP Vijandran [2001] 4 MLJ 161 (refd)
Kian Lup Construction v Hongkong Bank Malaysia Bhd [2002] 7 CLJ 32 (refd)
Knupffer v London Express Newspaper Ltd [1944] AC 116 PC (refd)
Lee Kuan Yew v Davies & Ors [1989] 1 SLR 1063 (refd)
Morgan v Odhams Press Ltd & Anor [1971] 2 All ER 1156 (refd)
Murugason v The Straits Times Press [1975] Ltd [1984–1985] 1 SLR 334 (refd)
S Pakianathan v Jenni Ibrahim [1988] 1 CLJ 771, [1988] 2 MLJ 173 (refd)
SB Palmer v AS Rajah & Ors [1949] MLJ 6 (refd)
Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Bhd & Anor [1973] 2 MLJ 56 (refd)
Wennhak v Morgan (1888) 20 QBD 635 (refd)
Yussoupoff v Metro-Goldwyn-Mayer Pictures Ltd [1934] 50 TLR 58 (refd)

Appeal from: Summons No 73–123 of 1998) (Magistrate's Court, Melaka)

P Vanaja Dewi (A Rengganathan & Co) for the defendant.

Low Hop Bing J:

Appeal

[1] This is an appeal by the appellant/defendant ('the defendant') against the decision of the learned magistrate who on 6 August 2001 and 14 August 2001 found the defendant liable in libel against the plaintiff and awarded to the plaintiff a sum of RM8,000 as damages, and a further sum of RM1,000 as exemplary damages.

Facts of the case

[2] In June 1996, the defendant appointed the plaintiff to carry out demolition and construction works in the plaintiff's house in Bukit Duyong, Melaka.

[3] On 7 August 1996, the defendant was informed by his wife that some money and jewellery in the house were found to be missing. On the same date, the defendant lodged Kandang, Melaka police report No 847/96 which reads as follows :

> Pada 6 Ogos 1996 jam lebih kurang l000hrs pagi masa itu saya ada letakan beg duit yang berisi wang RM4470, gelang emas tiga urat dan satu gelang emas didalam bilik di rumah saya. Pada 6 Ogos 1996 jam lebih kurang 1200 tengahari datang tiga orang pekerja untuk memasang pintu dan salah seorang dikenali namanya Zainal. Pada jam 7.30 petang pada hari yang sama saya lihat tiga pekerja tersebut berkerja dalam keadaan tergesa gesa dan mencurigakan, saya tidak mengesaki apa apa pada masa itu dan salepas itu pekerja tersebut balik dan meninggalkan pintu bahagian belakang tanpa dipasang.
>
> Pada 7 ogos 1996 jam lebih kurang 1000 pagi saya diberitahu oleh isteri saya bahawa wang dan barang kemas yang disimpan di dalam bilik telah hilang ada kesan kena pecah dan bilik tidak diselongkar. Saya syak hati perkara ini dilakukan salah seorang tiga pekerja yang mengambilnya. Kerugian lebih kurang RM7500. Inilah repot saya.
>
> [My translation:
>
> On 6 August 1996 at about 1000 hours I placed a bag with money amounting to RM4,470, three pieces of gold bangles and another piece of bangle in a room of my house. On 6 August 1996 at about 1200 hours three workers came to install a gate and one of them was known to me as Zainal. At about 7.30pm on the same day I saw the three workers working in a hurry and suspiciously, I did not suspect anything at that time and subsequently the workers went home, without installing the gate.
>
> On 7 August 1996 at about 1000 hours I was told by my wife that the money and jewellery placed in the room were missing, as there were traces of the room being broken into and not rummaged. I suspected it to be the work of one of the three workers who took them away. The loss to me is about RM7,500. This is my report.]

[4] The plaintiff sued the defendant in the court below for libel on the basis of the said police report. Evidence was adduced by the plaintiff and the defendant respectively and no other witness was called.

Submission by counsel and decision of the court

[5] The plaintiff was legally represented in the court below, but his counsel has since discharged himself in the appeal before me.

[6] The defendant through learned counsel Ms P Vanaja Dewi submitted that the plaintiff's statement of claim has failed to comply with the drafting requirements in pleading libel to establish the tort of libel against the defendant, and that the learned magistrate has erred in law in holding that the defence of qualified privilege did not apply.

Plaintiff's statement of claim

[7] The tort of defamation ie libel and slander requires a special treatment in so far as the drafting of the pleading is concerned, in particular the plaintiff's statement of claim. A classic illustration has been set out by *Bullen & Leake & Jacobs's Precedents of Pleadings*, at p 623 as follows:

> (b) Pleading the statement of claim
>
> Libel — pleading publication — words to be set out. The words must be set out verbatim in the statement of claim. It is not enough to set out their substance or effect (*Harris v Warre* (1879) 4 CPD 125 at p 127; *Coffins v Jones* (1955) 1 QB 564). Where the defamatory words form only part of a longer article or programme, the plaintiff must set out in his statement of claim only the particular passages of which he complains as being defamatory of him (*DDSA Pharmaceuticals Ltd v Times Newspapers Ltd* (1973) 1 QB 21, CA). Question and answer must be set out if the libel is contained in both together (*Bromage v Prosser* (1825) 4 B & C 247).

[8] (See also *Karpal Singh a/l Ram Singh v DP Vijandran* [2001] 4 MLJ 161 at pp 890-891 per Abdul Hamid Mohamad JCA (now FCJ); and *Hassan & Anor v Wan Ishak & Ors* [1961] MLJ 45 at p 46 per Thomson CJ (later LP).

[9] In relation to the alleged libel in this appeal, para 5 of the plaintiff's statement of claim reads:

> 5 Peristiwa tersebut disebabkan defendan telah melaporkan kepada pihak polis melalui Report No 847/96 bahawa beg duit berisi wang RM4,470 dan gelang-gelang emas yang kesemuanya bernilai RM7,500 yang disimpan di dalam bilik rumah defendan telah hilang. Defendan selanjutnya mengatakan ada kesan kena pecah dan bilik tidak diselangkan dan dia syak hati adalah perbuatan plaintif yang mengambil barang-barang yang hilang itu.
>
> [My translation:
>
> 5 The above incident was caused by the defendant having reported to the police vide Report No 847/96 that a bag containing RM4,470 and gold bangles, amounting to RM7,500 placed in a room of the defendant's house were missing. The defendant further stated that there are traces of the room being broken into and not intervened (or interposed), and he suspected that it was the plaintiff who took the missing items.]

[10] First of all, it is to be noted that the draftsman of the plaintiff's statement of claim has pleaded 'bilik tidak diselang' (the room was not intervened (or interposed)) when the police report stated 'bilik tidak diselongkar' (the room was not rummaged). The inadvertence only demonstrates the skill or the lack of it on the part of the draftsman for the plaintiff's statement of claim.

[11] In any event, it has fallen short of the requirement of drafting the statement of claim for the tort of libel as it was not what the defendant has stated in his police report as reproduced in extenso above.

[12] Be that as it may, in this appeal, I shall consider the issue as to whether the plaintiff has discharged the burden of proving libel against the defendant.

Ingredients of libel

[13] In *Ayob bin Saud v TS Sambanthamurthi* [1989] 1 MLJ 315 at p 316, Mohd Dzaiddin J (later Chief Justice) explained that:

> In our law on libel, which is governed by the Defamation Act 1957, the burden of proof lies on the plaintiff to show (1) the words are defamatory; (2) the words refer to the plaintiff; and (3) the words were published.

[14] The above authority was followed by Ramly Ali J in *Kian Lup Construction v Hongkong Bank Malaysia Bhd* [2002] 7 CLJ 32 at p 41 a–b.

Whether the words are defamatory?

[15] In respect of this issue, it has been said that there is no precise test applied to determine whether or not any given words are defamatory or are capable of a defamatory imputation. Several general formulations have been accepted and may be stated as follows:

(a) Any imputation which may tend 'to lower the plaintiff in the estimation of right thinking members of society generally' (see *SB Palmer v AS Rajah & Ors* [1949] MLJ 6); 'to cut him off from society' or 'to expose him to hatred, contempt or ridicule' (see *Abdul Rahman Talib v Seenivasagam & Anor* [1965] 1 MLJ 142);

(b) A defamatory statement is one to a man's discredit, or which tends to lower him in the estimation of others, or to injure his reputation in his office, trade or profession, or to injure his financial credit or if the words cause him to be shunned or avoided: *Yussoupoff v Metro-Goldwyn-Mayer Pictures Ltd* [1934] 50 TLR 58; per Mohamed Azmi J (later FCJ) in *Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Bhd & Anor* [1973] 2 MLJ 56 at p 58, *Gatley on Libel and Slander* (6th Ed) p 4, as followed by Ramly Ali J in *Kian Lup Construction*, pp 41–42.

[16] In relation to the police report lodged by the defendant, neither the plaintiff's fundamentally flawed statement of claim nor his oral evidence has ever identified which particular words therein are defamatory of him or has contained any defamatory imputation against him, since the actual words in the police report have never been specifically pleaded by the plaintiff in his statement of claim. The learned magistrate did not appear to have considered this fundamental flaw in the plaintiff's statement of claim.

Did the words concern the plaintiff?

[17] The next issue the plaintiff has to establish is that the defamatory words or remarks in the police report were published of and concerning him: Kian Lup Construction per Ramly Ali J, following *Knupffer v London Express Newspaper Ltd* [1944] AC 116 PC; *Institute of Commercial Management, United Kingdom v New Straits Times Press (Malaysia) Bhd* [1993] 1 MLJ 408 per Lim Beng Choon J (as he then was); *Lee Kuan Yew v Davies & Ors* [1989] 1 SLR 1063; *Morgan v Odhams Press Ltd & Anor* [1971] 2 All ER 1156 HL; *Hough v London Express Newspaper Ltd* [1940] 2 KB 507; *Murugason v*

A *TheStraits Times Press [1975] Ltd* [1984–1985] 1 SLR 334.

[18] Again, since the plaintiff's statement of claim did not plead the actual words used in the police report, it is impossible for the learned magistrate to come to a specific finding as to which defamatory words or defamatory imputations were published of and concerning the plaintiff.

B

Publication to third person

[19] The next issue to consider is whether the plaintiff has discharged the burden of proving that the defendant has published the police report to a third person: *Hebditch v MacIlwaine* [1894] 2 QB 54, at p 58 per Lord Esher MR; *S Pakianathan v Jenni Ibrahim* [1988] 1 CLJ 771 at p 776, [1988] 2 MLJ 173; *Wennhak v Morgan* (1888) 20 QBD 635; *Gatley on Libel and Slander* (9th Ed) at p 134; *Kian Lup Construction*, per Ramly Ali J.

C

[20] Para 5 of the plaintiff's statement of claim merely stated that the defendant has made a police report but did not plead to whom the alleged libel has been published. No police personnel has been called by the plaintiff to prove this essential issue of publication to a third party.

D

Qualified privilege

E

[21] It is also pertinent to point out that the learned magistrate had concluded that in making the police report, the defendant could not rely on the defence of qualified privilege, although he has specifically found that there was no malice on the part of the defendant ('tiada unsur niat jahat timbul dari defendan') at p 14 of the appeal record.

F

[22] In *Hoe Thean Sun & Anor v Lim Tee Keng* [1999] 3 MLJ 138, the plaintiff brought an action against the defendant alleging that certain statements appearing in the defendant's police report were defamatory of him. KN Segara J held, inter alia, that the law clearly recognized that all statements made in a police report are statements made on a privileged occasion, and that the privilege is qualified, though not absolute. The learned judge added that the primary purpose of a police report is to set in motion the investigation of an offence and bring to justice the offender and perpetrators, if any, at the conclusion of the investigation by the appropriate authorites.

G

H **[23]** The plaintiff has to prove malice on the part of the defendant (see also *Abdul Rahman Talib*, *Ayob bin Saud*, *Gatley on Libel and Slander* (9th Ed) p326, and *Kian Lup Constuction*).

[24] Agreeing with and applying the aforesaid principles, I am of the view that the learned magistrate has erred in failing to apply the defence of qualified privilege as the plaintiff was unable to adduce any evidence of malice on the part of the defendant. As alluded to above, the learned magistrate has indeed come to a specific finding that there was no malice on the part of the defendant.

I

Conclusion

[25] On the foregoing grounds, I hold that the decision of the learned magistrate cannot be legally sustained and that there are merits in this appeal. I therefore allow this appeal with costs and set aside the whole decision of the court below.

Appeal allowed.

Reported by Sally Kee Seok Meng